A **LEE WOON JENG v. EXCEL CHAMP AUTOMOBILE SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR
HARMINDAR SINGH DHALIWAL J
[CIVIL APPEAL NO: 11BNCC-11-10-2014]
19 MAY 2015

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TORT: *Vicarious liability – Principal's liability for agent's lawful act – Purchase of car – Cheque issued for 40% of purchase price as booking fee – Fraudulent use of cheque by car sales consultant (employee) – Whether employer vicariously liable for actions of employee – Whether act of employee, tortious or criminal closely connected to scope of employee's employment – Whether employee acted on frolic of his own – Whether employee had authority or ostensible authority to collect 40% of purchase price as booking fee*

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The appellant ('the plaintiff') had visited the respondent's ('the defendant') showroom in Subang Jaya, Selangor. The defendant was in the business of distribution and selling Mazda brand vehicles. The plaintiff was attended to by one Goh Khan Lee ('GKL') who was the defendant's sales consultant. The plaintiff was interested in a Mazda CX-5 ('Mazda') and agreed to purchase the said Mazda at the price of RM144,830.70. Due to concerns about financing facilities, GKL suggested that the plaintiff make a higher down payment in the sum of RM57,932,00 being 40% of the price of the said Mazda. Whilst preparing the cheque, the plaintiff was informed by GLK that the defendant's owners had three other companies and that the payment need not necessarily be made in the defendant's name. As such, GKL requested the plaintiff to leave the payee's name of the cheque blank. Therefore, the plaintiff prepared the cheque without the payee's name and passed it to GKL. After a few days, the plaintiff informed GKL that he wished to cancel the said booking. GKL in response, informed the plaintiff that it was not a problem and that he would prepare a refund of RM57,732 minus the cancellation fee in the sum of RM200. The plaintiff subsequently received a Public Bank cheque from GKL at the defendant's showroom (PBB cheque). The PBB cheque was issued by Sing Hong Tractor & Construction ('Sing Hong'). However the PBB cheque was dishonoured by the bank. As no sum had been paid either by GKL or the defendant, the plaintiff filed a suit in the Magistrate's Court against the defendant for vicarious liability. The Magistrate, however, dismissed the plaintiff's claim on the ground *inter alia* that (i) GKL acted out of the ordinary course of business; (ii) the plaintiff had been cheated by GKL but with no involvement of the defendant; (iii) the plaintiff had failed to bring GKL as party to the suit or as a witness to explain the alleged transaction; and (iv) the plaintiff had failed to take precautions in issuing the cheque without the payee's name and without insisting on the official receipt. Dissatisfied, the plaintiff appealed against the Magistrate's decision. At the High Court, it was argued that the Magistrate's finding that GKL acted outside the defendant's ordinary course of business in accepting

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the RM57,932 had no basis in law as the pleaded case of the plaintiff was that (i) GKL had no actual authority or at the very least ostensible authority from the defendant to do all matters within his scope of employment, namely to sell Mazda brand vehicles for the defendant and to accept payments on behalf of the defendant from customers; and (ii) the defendant was vicariously liable for the acts of their employees, including that of GKL, notwithstanding such acts were tortious or criminal in nature. It was argued by the plaintiff that the correct legal test to determine the defendant's liability in the present case was whether the acts of their employee, tortious or criminal, was so closely connected to the scope of the employee's employment. On the contrary, the defendant contended that the Magistrate had correctly determined that GKL had acted on a 'frolic of his own' and outside the ordinary course of business of the defendant in accepting the 40% of the purchase price as booking fee, when in actual fact, GKL was only authorised to collect 1% of the purchase price as booking fee. As such, the defendant argued that it could not be held to be vicariously liable for the plaintiff's claim.

Held (allowing plaintiff's claim with costs):

(1) The relationship between the wrongdoer *ie*, GKL and the defendant was capable of giving rise to vicarious liability. At the material time, GKL was their sales consultant at the defendant's showroom where the wrongdoing took place. There was in any event actual authority, or at least ostensible authority on the part of GKL to act for the defendant when the plaintiff attended at the defendant's showroom. (para 48)

(2) GKL had been guilty of fraud as the money paid by the plaintiff was intended to be paid to the defendant but was taken by GKL for his own purpose thus, wrongfully depriving both the plaintiff and the defendant of those monies. GKL acted on behalf of the defendant although he was only authorised to collect 1% of the purchase price as booking fee which was to go towards payment of the deposit. It would have been a different matter if while trying to sell the car, GKL on his own had tried to persuade the plaintiff to part his money on a fraudulent scheme unconnected to the defendant's business of selling cars. That would more likely be construed as an independent act or being engaged on a 'frolic of his own'. As such, there was sufficiently close connection between the wrongdoing and GKL's duties to warrant imposition of vicarious liability on the defendant. (paras 51, 52, 53 & 54)

(3) Although GKL's authority was limited to collecting only 1% of the purchase price as booking fee and that GKL had exceeded his authority or had no authority was not the basis upon which vicarious liability was to be decided. Regard only needed to be paid to the closeness of the connection between the employee's wrongdoing and the class of acts which he was employed to perform. (para 55)

(4) Collection of money by GKL from the plaintiff was for the purpose within the ordinary course of the defendant's business although the collection of such monies by GKL was dishonest. The monies collected by GKL were in pursuit of a benefit to the defendant, namely, the sale of the Mazda. The fraudulent act of GKL could not be viewed in isolation. The act of the defendant, dishonest as it was, was so closely connected with the acts that GKL was authorised to do that for the purpose of liability of the defendant such acts may fairly and properly be regarded as done by him in the ordinary course of the firm's business. (para 56)

(5) Another factor which supported liability was that GKL was authorised to collect payment as part of its duties, the risk of fraud on the part of GKL and other employee' with the same duties, was inherent in the defendant's business. The risk of fraud was reasonably incidental to the type of business carried out by the defendant. There was certainly an enhanced risk that GKL may misuse his duty to collect payment. This was certainly foreseeable by the defendant and they were in a position to do something about it. The plaintiff, on the other hand, had only the expectation that employees, whom the defendant had chosen, would deal honestly with him. Therefore, it would be fair and just that liability be imposed on the defendant. (para 57)

(6) The argument that with due diligence on the part of the plaintiff, the fraud by GKL could have been prevented was without merit and the Magistrate's reasoning could not be sustained. The defence of negligence would not be available to GKL. It followed that no such defence ought to be available to the employer. With regards to the plaintiff's failure to call GKL, the plaintiff could hardly be faulted for not calling as his witness was someone who had caused him wrongful loss and who would be hostile to him. It remained the plaintiff's prerogative to claim against any party he chooses. The only burden on him was to prove his case on a balance of probabilities. (paras 58, 64 & 67)

Case(s) referred to:

Armagas Ltd v. Mundogas SA [1986] 1 AC 717 ***(refd)***
Bazley v. Curry [1999] 2 SCR 534 ***(refd)***
Bernard v. Attorney-General of Jamaica [2005] IRLR 398 ***(refd)***
Brown v. Robinson [2004] UKPC 56 ***(refd)***
Caparo Industries Plc v. Dickman [1990] 2 AC 605 ***(refd)***
Chew Hock San & Ors v. Connaught Housing Development Sdn Bhd & Another Case [1985] 1 CLJ 533; [1985] CLJ (Rep) 64 FC ***(refd)***
Dalton v. Henry Angus & Co [1881] 6 App Cas 740 ***(refd)***
Dubai Aluminium Company Ltd v. Salaam [2003] 2 AC 366 ***(refd)***
Jacobi v. Griffiths [1999] 2 SCR 570 ***(refd)***
Keppel Bus Co Ltd v. Sa'ad Ahmad [1974] 1 LNS 62 PC ***(refd)***
Lee Beng Choon v. Tan Ngiap Kee [1962] 1 LNS 75 HC ***(refd)***
Lister v. Hesley Hall Ltd [2002] AC 215 ***(refd)***

Maga v. The Trustees of the Birmingham Archdiocese of the Roman Catholic Church [2010] 1 WLR 1441 ***(refd)***
Majrowski v. Guy's and St Thomas' NHS Trust [2007] 1 AC 224 ***(refd)***
Maslinda Ishak v. Mohd Tahir Osman & Ors [2009] 6 CLJ 653 CA ***(refd)***
Mattis v. Pollock [2003] 1 WLR 2158 ***(refd)***
Mohamud v. WM Morrison Supermarkets plc [2014] 2 All ER 990 ***(refd)***
Morris v. C W Martin & Sons Ltd [1966] 1 QB 716 ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Murni Haji Mohd Taha v. PP [1986] 1 MLJ 260 ***(refd)***
Muthammal Rose Udayar & Anor v. ACP A Paramasivam & Ors [2011] 1 LNS 1565 HC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
Redgrave v. Hurd [1881] 20 Ch D 1 ***(refd)***
Rose v. Plenty [1976] 1 All ER 97 ***(refd)***
Samin Hassan v. Government of Malaysia [1976] 1 LNS 139 FC ***(refd)***
Sanderson v. Collins [1904] 1 KB 628 ***(refd)***
Standard Chartered Bank v. Pakistan National Shipping Corpn and others (Nos 2 and 4) [2003] 1 AC 959 ***(refd)***
The Catholic Child Welfare Society & Ors v. Various Claimants & The Institute of the Brothers of the Christian Schools & Ors [2012] 3 WLR 1319 ***(refd)***
Wilsons and Clyde Coal Co Ltd v. English [1938] AC 57 ***(refd)***

Legislation referred to:
Hire-Purchase Act 1967, s. 30A

For the appellant/plaintiff - James Ding Tse Wen; M/s Koh & CH Tay
For the respondent/defendant - Valerie Chong (Cindy Kiu with her); M/s Valerie Chong & Co

Reported by Sandra Gabriel

JUDGMENT

Harmindar Singh Dhaliwal J:

Introduction

[1] This appeal rests on the question of whether there ought to be imposition of liability on the employer for the wrongs of its employee. This raises a much larger question – in what circumstances should an employer be held liable for an intentional wrong committed by his employee in circumstances where no fault can be attributed to the employer?

[2] This question is usually understood in most common law jurisdictions as a question about vicarious liability, the development of which has been fashioned by judges with considerable impact on employment relationships and others connected with it. Such actions can also be considered on the principle of non-delegable duty (see *Dalton v. Henry Angus & Co* [1881] 6 App Cas 740; *Wilsons and Clyde Coal Co Ltd v. English* [1938] AC 57) where direct liability is imposed as opposed to derivative liability. The latter case is not in issue here.

[3] The appellant in this case was not successful in the Magistrate's Court at Kuala Lumpur in his attempt to impose vicarious liability on an employer whose employee had caused him financial harm. He now appeals to this court. For convenience, the parties will be referred to as they were in the court of first instance.

Background Facts

[4] The facts giving rise to the instant action can be stated as follows. The plaintiff had seen an advertisement in the China Press newspaper on the sale of the Mazda branded vehicles. On and about 13 August 2013, the plaintiff visited the defendant's showroom in Subang Jaya, Selangor. The defendant was in the business of the distribution and sale of the Mazda brand of vehicles. At the showroom, the plaintiff was attended to by one Goh Khan Lee ("GKL") who was the defendant's sales consultant.

[5] The plaintiff was interested in the vehicle known as Mazda CX-5. After a test drive, the plaintiff agreed to purchase the said vehicle for the 'on the road' price of RM144,830.70.

[6] Whilst discussing the hire-purchase options and financing facilities with GKL, the plaintiff raised concern about the financing margin for the hire purchase given that he had only recently returned to Malaysia. To alleviate the plaintiff's concern, GKL suggested that he could make a higher down payment. He then suggested to the plaintiff a sum of RM57,932 being 40% of the price of the said vehicle.

[7] Whilst preparing the cheque of RM57,932, GKL informed the plaintiff that the defendant's owners had three other companies and that the payment need not necessarily be made in the defendant's name. GKL requested the plaintiff to leave the payee name blank on the cheque so that once he received confirmation from his boss, he could write down the company's name on the cheque.

[8] The plaintiff then prepared a CIMB Cheque No. 678201 amounting to RM57,532 dated 13 August 2013 without the payee's name and passed it to GKL. The cheque was photocopied and the copy was given to the defendant. The copy had the defendant's stamp that stated "*Received From and on behalf of Excel Champ Only*" and it was signed and dated by GKL. GKL told the plaintiff that it will take three to four days to complete the documents and he will contact the plaintiff once it is done.

[9] After a few days, the plaintiff called GKL to inform him that he wished to cancel the booking for the Mazda CX-5. GKL told him that it was not a problem but the cancellation will incur a RM200 administrative charge. The plaintiff agreed. GKL said he will prepare a refund of RM57,932.

[10] On 5 September 2013, the plaintiff received a Public Bank cheque dated 9 September 2013 from GKL at the defendant's showroom. The cheque was issued by Sing Hong Tractor & Construction ("Sing Hong"). On 18 September 2013, the plaintiff was informed by his bank (CIMB) that the Sing Hong cheque was dishonoured. The plaintiff then went over to the defendant's showroom.

[11] At the defendant's showroom, the plaintiff met the defendant's manager, Lee Soon Hoe (SD1). SD1 confirmed that the plaintiff was not listed as a purchaser and no transaction was recorded on 13 August 2013. The plaintiff then lodged a police report alleging fraud on the part of GKL.

[12] At the defendant's showroom, SD1 had also informed the plaintiff that GKL was admitted in Hospital Universiti Kebangsaan Malaysia. On 19 September 2013, the plaintiff went to see GKL. GKL handed to the plaintiff a hand-written note stating that he will pay back the RM57,932.

[13] As no sum had been paid either by GKL or the defendant, the plaintiff filed the present suit against the defendant in the Magistrate's Court, KL. The trial was heard on 19 June, 17 July and 28 August 2014. On 25 September 2014, the learned Magistrate dismissed the plaintiff's claim. On the same day, the plaintiff filed the instant appeal.

The Trial Court

[14] Arising out of this factual matrix, the main issue confronting the trial court was whether the defendant was vicariously liable for the actions of GKL.

[15] The learned Magistrate decided after a trial that the plaintiff has failed to prove his case on a balance of probabilities. The reasons proffered for this finding were briefly that:

(a) GKL acted out of the ordinary course of business;

(b) There was sufficient evidence that the plaintiff had been cheated by GKL but with no involvement of the defendant;

(c) There was a failure in the part of the plaintiff to bring GKL as a party to the suit and/or at least bring GKL as a witness to explain the alleged transaction;

(d) The plaintiff had failed to take adequate precautions in issuing the cheque without the payee's name and without insisting on the official receipt or the vehicle sale order of the defendant; and

(e) The plaintiff failed to prove that the deposit paid was received by the defendant. Instead it was paid to a third party who had no connection with the defendant.

A **Arguments On Appeal**

[16] For the plaintiff it was argued that the learned Magistrate's finding that GKL acted outside the defendant's ordinary cause of business in accepting the RM57,932 has no basis in law as the pleaded case and legal premise of the plaintiff was that:

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(a) GKL had actual authority or at the very least, ostensible authority from the defendant to do all matters within his scope of employment, namely *inter alia* to sell Mazda branded vehicles for the defendant and to accept payments on behalf of the defendant from customers; and

C (b) that the defendant is vicariously liable for the acts of their employees, including that of GKL, notwithstanding such acts were tortious or criminal in nature.

[17] It was contended that the correct legal test to determine the defendant's liability in the present case is whether the acts of their employee, D whether it was tortious or criminal, were closely connected to the scope of the employee's employment. It was submitted that the learned Magistrate premised his decision on the wrong legal test and failed to address or adequately address the evidence led with regard to GKL's authority to act for the defendant and the case law on the area of vicarious liability. Failure E to do so it was argued warranted appellate intervention.

[18] For the defendant, it was argued that the learned Magistrate had correctly determined that GKL had acted on "a frolic of his own" and outside the ordinary course of business of the defendant. Relying on the cases of *Samin bin Hassan v. Government of Malaysia* [1976] 1 LNS 139; [1976] 2 F MLJ 211; *Armagas Ltd v. Mundogas SA* [1986] 1 AC 717 and *Chew Hock San & Ors v. Connaught Housing Development Sdn Bhd & Another Case* [1985] 1 CLJ 533; [1985] CLJ (Rep) 64, the defendant submitted that GKL's conduct in accepting the 40% of the purchase price and subsequently banking in to Sing Hong was his personal conduct and GKL had therefore acted on "a frolic of G his own" in the illegal transaction.

[19] It was also contended that GKL only had no authority to collect booking fee of more than 1% of the purchase price. This was stated in s. 30A of the Hire-Purchase Act 1967 which stated that booking fee shall not exceed 1% of the cash price of goods comprised in a hire-purchase agreement. H Accordingly, the defendant had no right to grant its sales consultant any authority to collect 40% of the purchase price from the intended hirer.

[20] In the instant case, GKL had actually exceeded his authority. It was therefore submitted that the defendant was not vicariously liable for the plaintiff's claim.

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Vicarious Liability

[21] An employer is vicariously liable for a tort committed by an employee in the course of his or her employment. The difficulty often arises with determining what is "in the course of employment" or sometimes referred to as scope of employment. To come within the scope of employment it is necessary to ascertain if what an employee does at work is sufficiently connected with the duties and responsibilities of the employee.

[22] As there was some dispute as to the correct test to apply in determining whether the defendant was vicariously liable in this case, it is necessary to consider the law on vicarious liability. To be fair to the learned Magistrate, he was referred to some fairly old legal cases, such as *Lee Beng Choon v. Tan Ngiap Kee* [1962] 1 LNS 75; [1962] 28 MLJ 315; *Sanderson v. Collins* [1904] 1 KB 628; *Samin bin Hassan v. Government of Malaysia* [1976] 1 LNS 139; [1976] 2 MLJ and *Rose v. Plenty* [1976] 1 All ER 97, which he appeared to have accepted in arriving at his decision on vicarious liability. In such cases, the judges have often referred to the employees going on a "frolic of their own" in describing acts of employees which have nothing to do with their employment or outside the scope of employment.

[23] Many of the arguments in the earlier cases revolved around the question whether, in the particular circumstances, the employee had been performing service for the employer but in an unauthorised way, hence the expression "frolic of his own".

[24] The connection between an employee acting within his scope of employment and the expression "on a frolic of his own" was explained by Diplock LJ in *Morris v. C W Martin & Sons Ltd* [1966] 1 QB 716 at p. 733:

> A coachman had a tendency, well-recognised in the nineteenth century, to drive off with his master's vehicle upon a 'frolic of his own' and sometimes to injure a passer-by while indulging in this foible. The only connection between the injury to the passer-by and the master's act in employing the coachman was that but for such employment the coachman would probably not have had the opportunity of driving off with the vehicle at all. At a period when judges themselves commonly employed coachmen, this connection was regarded as too tenuous to render the master vicariously liable to the passer-by for the injury caused by the coachman, at any rate if the master had exercised reasonable care in selecting him for employment. The immunity of the master from vicarious liability for tortious acts of a servant while engaged upon a frolic can be rationalised in a variety of ways. The master's employment of the servant was only a *causa sine qua non* of the injury: it was not the *causa causans*. It was not 'foreseeable' by the master that his employment of the servant would cause injury to the person who sustained it. The master gave no authority to the servant to create an Atkinian proximity relationship between the master and the person injured by the servant's acts. One or other of these rationalisations underlies the common phrase in which the test of the master's liability is expressed: 'Was the servant's act within the scope or course of his employment?'

[25] Be that as it may, the phrase "frolic of his own" is in itself vague and unhelpful as it does not provide a sufficient basis for determining the existence or limits of vicarious liability. It is probably for this reason that the authors of *Markesinis And Deakin's Tort Law* (7th edn, 2013) opined:

> The classical formulation is that of Parke B in *Joel v. Morrison*: '[i]f he [the driver] was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable'. This test is devoid of guidance since it begs the question. To call an action a 'frolic' is not to give a reason why it is outside the course of employment; it only expresses a decision already made that it is outside.

[26] Even so, Lord Diplock's explanation was not surprising at the time considering that the classical formulation which applied to determine whether an employee's tort was committed in the course of employment was the so-called Salmond test, from the first edition of *Salmond on Torts* way back in 1907. This test required that before vicarious liability can be inferred, there must exist a relationship of '*master and servant*' between the defendant and the person committing the wrong. The servant, in committing the wrong, must have been acting in the course of his employment. A servant is deemed to be acting in the course of his employment if his act is either (i) a wrongful act authorised by the master; or (ii) a wrongful and unauthorised mode of doing some act authorised by the master.

[27] It should be noted that the terms '*master*' and '*servant*' was the old-fashioned way of referring to what essentially was an employer-employee relationship. *Salmond* further explained in a later edition that an employer is liable even for unauthorised acts if they are so connected with authorised acts that they may be regarded as modes – although improper modes – of doing them, but the employer is not responsible if the unauthorised and wrongful act is not so connected with the authorised act as to be a mode of doing it, but is an independent act.

[28] What springs to mind at this juncture is that whilst an act of negligence may be easy to characterise as an unauthorised mode of performing an authorised act, an act of intentional, criminal wrongdoing, would be more likely seen as an independent act. This presented an opportunity for the House of Lords in *Lister v. Hesley Hall Ltd* [2002] AC 215 to clarify and extend the application of the Salmond test which had by then stood the test of time for almost a century.

[29] The facts in *Lister* were as follows. The defendants ran a boarding school for children. The claimants were boys who had been sexually abused by a warden employed by the defendants. They claimed that the defendants were vicariously liable for the abuse. Now these claims would have been unsuccessful had the *Salmond* test been applied as the sexual abuse could not be characterised as the warden doing what he was employed to do in an unauthorised way.

[30] The House of Lords departed from this approach on the reasoning that the Salmond test did not actually work well in cases of intentional wrongdoing. Influenced by the decisions of the Supreme Court of Canada in *Bazley v. Curry* [1999] 2 SCR 534 and *Jacobi v. Griffiths* [1999] 2 SCR 570, the House of Lords adopted a different test, that is, an employee will be held to have acted in the course of his employment when he committed a tort if that tort was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable for that tort.

[31] This 'close connection' test enabled the House of Lords to hold that the sexual abuse was so inextricably interwoven with the task of the warden in looking after the boys as delegated by his employer that it would be fair, in the House of Lords opinion, that the employers be vicariously liable for the abuse.

[32] Considering the wide variety of ways in which cases involving vicarious liability can come before the courts, this test provided greater flexibility and was reminiscent of the 'fair, just and reasonable' test formulated in *Caparo Industries Plc v. Dickman* [1990] 2 AC 605 for novel 'duty of care' situations. One such case was *Muthammal Rose Udayar & Anor v. ACP A Paramasivam & Ors* [2011] 1 LNS 1565; [2011] 2 AMR 214. This flexibility is necessary in view of the inevitable changes in social development affecting the workplace environment as well as employment relationships.

[33] Shortly after *Lister*, the House of Lords considered vicariously liability in a commercial case – *Dubai Aluminium Company Ltd v. Salaam* [2003] 2 AC 366. In that case, liability was imposed on a partnership of solicitors for the wrongful act of assisting in a fraud of one of the partners. Their Lordships were of the opinion that liability depended not on the actual or apparent authority of the partner committing the tort but on whether the wrongful act was so closely connected to the acts the partner was authorised to do.

[34] Lord Nicholls in *Dubai Aluminium* described the test in this way:

> Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business or the employee's employment. (at para [23]).

[35] Lord Millet in the same case also summarised some important principles relating to vicarious liability as follows:

> So it is no answer to say that the employee was guilty of intentional wrong-doing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty. (at para [79]).

[36] Nevertheless, Lord Nicholls acknowledged the limitations of the 'close connection' test in the same case:

> This "close connection" test focuses attention in the right direction. But it affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close to prompt the legal conclusion that the risk of the wrongful act occurring, and any loss flowing from the wrongful act, should fall on the firm or employer rather than the third party who was wronged … This lack of precision is inevitable, given the infinite range of circumstances where the issue arises. The crucial feature or features, either producing or negativing vicarious liability, vary widely from one case or type of case to the next. Essentially the court makes an evaluative judgment in each case, having regard to all the circumstances and, importantly, having regard also to the assistance provided by previous court decisions." (at para [26]).

[37] In the earlier judgment of the Supreme Court of Canada in *Bazley*, *supra*, particular emphasis was laid to employers carrying out an enterprise with inherent risks of injury being caused to members of the community dealing with it. In that case, the defendants, who were running residential care facilities for emotionally troubled children, unwittingly employed a paedophile who sexually abused one of the children. McLachlin J, who delivered the judgment of the Supreme Court of Canada, noted the policy considerations underlying the concept of vicarious liability and observed (at p. 557):

> Underlying the cases holding employers vicariously liable for the unauthorised acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise creates or exacerbates. Similarly, the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong ... The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence.

[38] On the question of degree of connection, Her Ladyship further observed (at p. 559):

> The fundamental question is whether the wrongful act is sufficiently related to conduct authorised by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues there from, even if unrelated to the employer's desires.

[39] This creation of risk justification for imposing liability was endorsed by Lord Nicholls in *Dubai Aluminium* where he said (at para. [21]):

> The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risk that others will be harmed by wrongful acts committed by the agents through whom the business is

carried on. When the risk ripens into loss, it is just that the business should be responsible for compensating the person who has been wronged.

[40] The 'close connection' test was followed by the Privy Council in *Bernard v. Attorney-General of Jamaica* [2005] IRLR 398 and *Brown v. Robinson* [2004] UKPC 56. It was also approved by the House of Lords in *Majrowski v. Guy's and St Thomas' NHS Trust* [2007] 1 AC 224, the Court of Appeal of England in *Mattis v. Pollock* [2003] 1 WLR 2158 and *Maga v. The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441, the Supreme Court in *The Catholic Child Welfare Society & Ors v. Various Claimants & The Institute of the Brothers of the Christian Schools & Ors* [2012] 3 WLR 1319.

[41] Recently, the English Court of Appeal in *Mohamud v. WM Morrison Supermarkets plc* [2014] 2 All ER 990 approved of a two-stage test of vicarious liability. The first stage involves a consideration of the relationship between the primary wrongdoer and the person alleged to be liable and whether that relationship is capable of giving rise to vicarious liability. The second stage relates to whether there is a sufficiently close connection between the wrongdoing and the employment so that it would be fair and just to hold the employers vicariously liable.

[42] The Court of Appeal also relied on the factors relevant in considering intentional torts in *Bazley v. Curry, supra* at para. 41, such as:

(a) The opportunity that the enterprise afforded the employee to abuse his or her power; (b) The extent to which the wrongful act may have furthered the employer's aims (and hence more likely to have been committed by the employee); (c) The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise; (d) The extent of power conferred on the employee in relation to the victim; (e) The vulnerability of potential victims to wrongful exercise of the employee's power.

[43] In the Malaysian context, the Court of Appeal in *Maslinda Ishak v. Mohd Tahir Osman & Ors* [2009] 6 CLJ 653; [2009] 6 MLJ 826 had occasion to deal with the issue of vicarious liability. The facts of the case were as follows. The respondents were, a member of Angkatan Relawan Rakyat Malaysia [RELA] (first respondent), the Director-General of RELA (second respondent), the Director of Jabatan Islam Wilayah Persekutuan Kuala Lumpur [JAWI] (third respondent) and the Government of Malaysia (fourth respondent). The appellant was arrested by officers of the second and third respondents and put in a truck with other arrested persons in a joint operation.

[44] Sometime along the journey, the appellant asked permission from the officers to use toilet facilities. Her permission was denied and she was asked to ease herself in the truck. Unable to control her bladder, the appellant eased herself in the truck whilst others shielded her from view by encircling her

and by using a shawl. At that juncture, the first respondent opened the truck's door, rushed in, pulled the shawl away and took photographs of the appellant squatting and urinating.

[45] The High Court held that:

(a) although the first respondent were carrying out their duties in their official capacity, the first respondent was never ordered to photograph any arrested person and that the camera belonged to the first respondent;

(b) taking photographs of the appellant urinating was not part of the first respondent's duty; and

(c) therefore, the second, third and fourth respondents were not vicariously liable for the first respondent's acts.

[46] At the Court of Appeal, the findings of the learned trial judge that the action of the first defendant was a "frolic of his own" came under serious challenge. The Court concluded, following the Privy Council decision of *Keppel Bus Co Ltd v. Sa'ad bin Ahmad* [1974] 1 LNS 62; [1974] 1 MLJ 191, that the evidence of snapping the photographs being so closely connected to the duties of the first respondent was overwhelming. Accordingly the second, third and fourth respondents were found vicariously liable for the wrongful act of the first respondent.

[47] The foregoing are now considered settled principles with regard to legal liability of employers for the wrongs of employees. It is with these principles in mind that this appeal ought to be considered and decided.

The Instant Appeal

[48] Coming back to the two-stage test of vicarious liability in *Mohamud v. WM Morrison Supermarkets plc, supra,* in relation to the first stage, it can hardly be disputed that the relationship between the wrongdoer (GKL) and the defendant was capable of giving rise to vicarious liability. It was admitted by the defendant that at the material time, GKL was their sales consultant at the defendant's showroom where the wrongdoing took place. There was in any event actual authority, or at least ostensible authority, on the part of GKL to act for the defendant when the plaintiff attended at the defendant's showroom.

[49] I come now to the second stage of the test. To recall the second stage relates to whether there is a sufficiently close connection between the wrongdoing and the employment so that it would be fair and just to hold the employers vicariously liable. As was stated by Lord Nicholls in *Dubai Aluminium*, "the court makes an evaluative judgment in each case, having regard to all the circumstances and, importantly, having regard also to the assistance provided by previous court decisions".

[50] In this connection, the specific responsibilities and duties of GKL require close examination. There was evidence that the defendant's sales consultant's scope of their employment (including that of GKL) includes:

(a) promoting the vehicles under the Mazda brand for the defendant;

(b) encouraging people to buy vehicles from the defendant;

(c) discussing the Mazda's specifications with the potential customers;

(d) satisfying the customers on any queries they may have on the Mazda vehicles;

(se) arranging for test-drives of Mazda vehicles; and

(f) discussing the purchasing and payment facility options with the potential customers.

[51] There can be little dispute that GKL had been guilty of fraud as the money paid by the plaintiff was intended to be paid to the defendant but it was in the end taken by GKL for his own purpose thus wrongfully depriving both the plaintiff and the defendant of those monies. There was certainly no collusion between the plaintiff and GKL as was plain from the evidence.

[52] Now the question that arises is – in taking those monies, was GKL acting solely on his own behalf or was he acting on behalf of the defendant's company? I can only conclude that GKL must have been acting on behalf of the defendant's company although he was only authorised to collect 1% of the purchase price as booking fee which was to go towards payment of the deposit.

[53] It would have been a different matter if while trying to sell the car, GKL also on his own had tried to persuade the plaintiff to part with his money on a fraudulent scheme unconnected to the defendant's business of selling cars. Or if there was an argument in the defendant's showroom between GKL and the plaintiff as to which football team is better and GKL causes injury to the plaintiff during that argument. That would more likely be construed as an independent act or being engaged "on a frolic of his own".

[54] For the instant action, however, there can be little doubt in my mind that there was a sufficiently close connection between the wrongdoing and GKL's duties to warrant imposition of vicarious liability on the defendant.

[55] Although much was made of the fact that GKL's authority was limited to collecting only 1% of the purchase and that GKL had in fact exceeded his authority or had no authority, I think as the cases show, and which I had alluded to in the foregoing discussion, that is not the basis upon which vicarious liability is to be decided. Regard only needs to be paid to the closeness of the connection between the employee's wrongdoing and the class of acts which he was employed to perform.

[56] In the instant case, it was clear that the collection of money by GKL from the plaintiff was for a purpose within the ordinary course of the defendant's business although the collection of such monies by GKL was dishonest. The monies collected by GKL were in pursuit of a benefit to the defendant, namely, the sale of the Mazda brand vehicle. The fraudulent act of GKL cannot be viewed in isolation. The act of the defendant, dishonest as it was, was so closely connected with the acts that GKL was authorised to do that for the purpose of liability of the defendant such acts may fairly and properly be regarded as done by him in the ordinary course of the firm's business.

[57] Another factor which supports liability is that as GKL was authorised to collect payment as part of his duties, the risk of fraud on the part of GKL and other employees with the same duties, was inherent in the defendant's business. Put another way, the risk of fraud was reasonably incidental to the type of business carried on by the defendant. There was certainly an enhanced risk that GKL may misuse his duty to collect payment. This was certainly foreseeable by the defendant and they were in a position to do something about it. The plaintiff, on the other hand, had only the expectation that employees, whom the defendant had chosen, would deal honestly with him. In all the circumstances of this case, it would be fair and just that liability be imposed on the defendant.

Negligence Of Plaintiff

[58] In this regard, the learned Magistrate had made a finding that the plaintiff was negligent by giving a cheque to GKL without entering the payee's name. In rejecting the claim, the learned Magistrate surmised that the plaintiff had only himself to blame. In essence, the argument here is that with due diligence on the part of the plaintiff the fraud by GKL could have been prevented.

[59] It appears that by his reasoning, the learned Magistrate had introduced the concept of negligence in his determination of whether GKL's act was within the ordinary course of business. Vicarious liability is in reality a specie of strict liability as observed by Lord Millet in *Lister.* It is not premised on any culpable act or omission on the part of the employer; an employer who is not personally at fault is made legally answerable for the fault of his employee. It is best understood as a loss-distribution device (*Lister, supra* at para. [65]).

[60] This finding raises the question – can the plaintiff's negligence be a defence to claim in fraud? In this regard, the old case of *Redgrave v. Hurd* [1881] 20 Ch D 1 is instructive. In that case, the plaintiff, an elderly solicitor, published an advertisement in the newspapers to sell of his practice which he claimed generated a yearly income of £300. The defendant made enquiries with the plaintiff on the value of the practice and was told that the relevant documents showed how the yearly income was comprised of. The defendant

only looked cursorily and did not examine in detail, the documents which comprised of some letter-books, diaries and a day-book and ultimately entered into an agreement to purchase the house and share in the business for £1600.

[61] Upon entering into agreement, the defendant discovered that the practice was practically worthless and refused to complete the purchase. Upon the plaintiff's suit for specific performance, the defendant disputed the claim on the ground of misrepresentations as to the business. The plaintiff's argument against misrepresentation was the defendant could have, with due diligence, checked the documents thoroughly before deciding to enter into the agreement.

[62] In allowing the appeal, Jessel MR observed (at p. 130):

> There is another proposition of law of very great importance which I think it is necessary for me to state, because, with great deference to the very learned Judge from whom this appeal comes, I think it is not quite accurately stated in his judgment. If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, "If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself to them … Nothing can be plainer, I take it, on the authorities in equity than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence.

[63] The decision was considered by the House of Lords in *Standard Chartered Bank v. Pakistan National Shipping Corporation and others (Nos 2 and 4)* [2003] 1 AC 959 where the relevant point was succinctly stated by Lord Hoffmann as follows (at p. 966):

> It would be more accurate to say that it was careless in making payment against documents which, as it knew or ought to have known, did not comply with the terms of the credit, on the assumption that it could successfully conceal these matters from Incombank. In respect of the loss suffered, SCB was in my opinion negligent.
>
> Be that as it may, the real question is whether the conduct of SCB would at common law be a defence to the claim in *deceit* … This case seems to me to show that if a fraudulent representation is relied upon, in the sense that the claimant would not have parted with his money if he had known it was false, it does not matter that he also held some other negligent or irrational belief about another matter and, but for that belief, would not have parted with his money either. The law simply ignores the other reasons why he paid … In my opinion, the law takes no account of these other reasons for payment. This rule seems to me based upon sound policy. It would not seem just that a fraudulent defendant's liability should be reduced on the grounds that, for whatever reason, the victim should not have made the payment which the defendant successfully induced him to make.

[64] It would therefore appear that the defence of negligence would not be available to GKL. It must also follow that no such defence ought to be available to the employer. This contention is therefore without merit and the learned Magistrate's reasoning in this regard cannot be sustained.

Failure By Plaintiff To Call GKL

[65] The learned Magistrate also unfortunately took issue with the plaintiff's failure to call GKL as a witness to explain the transaction or at least be made a party to the suit. I do not think, with respect, this criticism laid on the plaintiff is valid or warranted. The learned Magistrate may well have the adverse presumption rule in mind although it is not stated in the judgment.

[66] It should be borne in mind that the presumption only operates if there is active, conscious, deliberate or intentional withholding, suppression or concealment of the evidence. An adverse inference would only arise if there is an improper, ulterior or oblique motive in not producing the witness. (*Murni bin Haji Mohd Taha v. PP* [1986] 1 MLJ 260*; Public Prosecutor v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233; [1996] 3 MLJ 560*; Munusamy Vengadasalam v. Public Prosecutor* [1987] CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492). None of these circumstances operate in the instant case. Importantly, it was also open to the defendant to call GKL as he was their employee. It was also open to the defendant to add GKL as a co-defendant or a third party.

[67] In the circumstances of this case, the plaintiff can hardly be faulted for not calling as his witness someone who has effectively caused him wrongful loss and who would be hostile to him. Needless to add, it remains the plaintiff's prerogative to claim against any party he chooses. The only burden on him is to prove his case on a balance of probabilities. For these reasons, the criticism in this regard by the learned Magistrate as well as the defendant is both misconceived and misplaced.

Conclusion

[68] In the circumstances, and for the reasons stated, appellate intervention is warranted as the decision of the learned Magistrate cannot be sustained on several issues of fact and law. Accordingly, the appeal of the plaintiff is allowed. It follows that the plaintiff is entitled to his claim against the defendant as filed in the Magistrate's court. The plaintiff is entitled to both the scale costs below and costs of this appeal fixed at RM4,000.